

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THERISA GREEN,

Plaintiff,

v.

BISHOP, WHITE, & MARSHALL, P.S.,

Defendant.

CASE NO. C10-5206BHS

ORDER GRANTING
PLAINTIFF'S MOTION FOR
LEAVE TO FILE AMENDED
COMPLAINT, DENYING
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT,
AND DENYING AS MOOT
PLAINTIFF'S MOTION FOR
STAY OR ABATEMENT

This matter comes before the Court on Plaintiff Therisa Green's ("Green") motion for leave to file an amended complaint (Dkt. 15), Defendant Bishop, White, & Marshall's ("BWM") motion for summary judgment (Dkt. 11), and Green's motion for stay or abatement of the Court's ruling on BMW's motion for summary judgment (Dkt. 16). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby grants Green's motion for leave to file an amended complaint, denies BWM's motion for summary judgment without prejudice, and denies as moot Green's motion to stay for the reasons stated herein.

On September 28, 2010, Green filed the instant motion to amend her complaint. Dkt. 15. On October 4, 2010, BMW filed its response to the motion to amend (Dkt. 20), and on October 15, 2010, Green replied (Dkt. 21). On September 13, 2010, BWM filed its motion for summary judgment. Dkt. 11. Green has not filed a response to BWM's motion for summary judgment.

1 The “Supreme Court has instructed the lower federal courts to heed carefully the
 2 command of Rule 15(a), F[ed].R.Civ.P., by freely granting leave to amend when justice
 3 so requires.” *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765 (9th Cir. 1986)
 4 (citations omitted). In considering whether to permit an amended pleading, courts
 5 consider the following factors: “(1) bad faith, (2) undue delay, (3) prejudice to the
 6 opposing party, (4) futility of amendment; and (5) whether plaintiff has previously
 7 amended his complaint.” *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).
 8 Courts should not grant leave to amend where amendment would be futile. *See*
 9 *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th
 10 Cir. 1983). Amendment is futile “only if no set of facts can be proved under the
 11 amendment to the pleadings that would constitute a valid and sufficient claim or defense.”
 12 *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

13 If the underlying facts or circumstances relied upon by a plaintiff
 14 may be a proper subject of relief, he ought to be afforded an opportunity to
 15 test his claim on the merits. In the absence of any apparent or declared
 16 reason—such as undue delay, bad faith or dilatory motive on the part of the
 17 movant, repeated failure to cure deficiencies by amendments previously
 18 allowed, undue prejudice to the opposing party by virtue of allowance of
 19 the amendment, futility of amendment, etc.[—]the leave sought should, as
 20 the rules require, be freely given.

21 *Breier v. Northern Cal. Bowling Proprietors' Ass'n*, 316 F.2d 787, 789-790 (9th Cir.
 22 1963) (citing *Foman v. Davis*, 371 U.S. 178, 182, (1962)) (internal quotations omitted).

23 Green moves the Court for leave to file an amended complaint within the time
 24 allotted by the Court for amending pleadings. Dkt. 10. BMW argues that the motion to
 25 amend was not timely. *See* Dkt. 18 at 1-2. The Court set the deadline for filing amended
 26 pleadings for September 28, 2010. Dkt. 10. Green filed her amended complaint on
 27 September 28, 2010. *See* Dkt. 15. Therefore, Green’s motion for leave to amend was
 28 timely.

BMW argues that filing an amended complaint at this time would prejudice BMW
 because it had spent fifty hours preparing a motion for summary judgment based on the

1 original complaint. Dkt. 18 at 2. BWM elected to file its motion for summary judgment
2 prior to the allotted due date for filing amended pleadings. Dkt. 11. Therefore, BWM is
3 not prejudiced—it can renew its motion for summary judgment after the amended
4 complaint is filed.

5 BWM also argues that the amended complaint would be futile because, “[t]o the
6 extent that new claims are raised in the proposed amended complaint, they are beyond the
7 statute of limitations.” Dkt. 18 at 2. However, because the Court finds that the briefing on
8 the statute of limitations issue is inadequate, it cannot conclude at this point that Green’s
9 amendment would be futile. Considering the *Allen* factors, the Court will permit Green to
10 amend her complaint. *See Allen*, 911 F.2d at 373. Once the amended complaint is filed,
11 BWM may renew its motion for summary judgment. Any such renewal shall be briefed in
12 accordance with the local rules.

13 Therefore, the Court **GRANTS** Green’s motion for leave to amend, **DENIES**
14 **without prejudice** BWM’s motion for summary judgment, and **DENIES** Green’s motion
15 to stay or abate as moot.

16 DATED this 10th day of November, 2010.

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19 BENJAMIN H. SETTLE
20 United States District Judge
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